Supreme Court, U.S.
FILED

No. 93-1106 JAN 10 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

EDMOND JACKSON,

Petitioner,

vs.

POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK AND ESTATE OF HAROLD CANNON BY HIS ADMINISTRATRIX AUDREY M. CANNON,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When, in a habeas corpus proceeding, a federal court of appeals affirms a district court finding of fact that a police officer acted in a grossly negligent manner by arranging overly suggestive pre-lineup procedures, resulting in denial of due process, may a state court in a subsequent civil rights action under 42 U.S.C. § 1983 ignore those federal findings of fact and grant summary judgment on the issue of a qualified immunity in favor of the police officer?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	2
Constitutional Provision and Statute Involved	2
Statement of the Case	2
A. The Statute	2
B. The Facts	2
C. Prior Proceedings	6
Reasons for Granting the Writ	7
Conclusion	13

TABLE OF CITATIONS

Cases Cited:

Doe v. Taylor, 975 F.2d 137 (5th Cir. 1992)	9
Fernandez v. Leonard, 784 F.2d 1209 (1st Cir. 1986)	9

Contents

	Page
Harlow v. Fitzgerald, 112 S. Ct. 534 (1982)	10, 11
Houghton v. South, 965 F.2d 1532 (9th Cir. 1992)	9
Jackson v. Fogg, 465 F. Supp. 177 (S.D.N.Y. 1978)	3
Jackson v. Fogg, 589 F.2d 108 (2d Cir. 1978)	4
Mitchum v. Foster, 407 U.S. 225, 92 S. Ct. 2151 (1972)	9, 10
People v. Jackson, 40 A.D. 2d 1081 (2nd Dept. 1972), *aff'd without opinion*, 35 N.Y. 2d 856 (1974)	3
Washington v. Newsom, 977 F.2d 991 (6th Cir. 1992)	9
Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988)	9
Statutes Cited:	
28 U.S.C. § 1257(3)	2
42 U.S.C. § 1983	i, 2, 7, 8, 9, 10, 11, 13
United States Constitution Cited:	
Fourteenth Amendment	2
APPENDIX	
Appendix A — Final Order of the Court of Appeals of the State of New York Dated October 14, 1993	1a

Contents

Page

Appendix B — Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department Dated July 9, 1993 ..... 2a

Appendix C — Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department Dated April 19, 1993 ..... 4a

Appendix D — Order and Memorandum of the New York Supreme Court, Queens County Dated March 5, 1991 . 8a

Appendix E — Second Amended Complaint Dated March 25, 1982 ..... 13a

Appendix F — Opinion of the United States Court of Appeals for the Second Circuit Dated December 19, 1978 ..... 17a

Appendix G — Decision and Order of the United States District Court for the Southern District of New York Dated August 25, 1978 ..... 27a

Appendix H — Opinion of the Court of Appeals of New York Dated December 18, 1974 ..... 67a

Appendix I — Opinion of the Supreme Court, Appellate Division, Second Department Dated December 4, 1972 ..... 68a

No.

In The

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October Term, 1993

EDMOND JACKSON,

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vs.

POLICE DEPARTMENT OF THE CITY OF NEW YORK AND THE CITY OF NEW YORK AND ESTATE OF HAROLD CANNON BY HIS ADMINISTRATRIX AUDREY M. CANNON,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, dismissing Petitioner's complaint, was decided on May 5, 1991. (A.8-12).[1]

1. References to the Appendix to the Petition are referred to herein as (A. __).

The decision of the Appellate Division of the State of New York, Second Department, affirming the decision is reported at 596 N.Y.S. 2d 457 (1993). (A.4-7). The decision of the Appellate Division of the State of New York, Second Department denying the Petitioner's motion for reargument and for leave to appeal to the Court of Appeals of the State of New York (July 9, 1993). (A.2-3). The decision of the Court of Appeals of the State of New York denying Petitioner's motion for leave to appeal to the Court of Appeals (October 14, 1993). (A.1).

STATEMENT OF JURISDICTION

The final order of the Court of Appeals for the State of New York was entered on October 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This action is brought pursuant to 42 U.S.C. §1983 seeking compensatory damages as well as other appropriate relief for the violation of Petitioner's Constitutional right to due process under the Fourteenth Amendment, resulting in his wrongful incarceration in prison for eight (8) years.

STATEMENT OF THE CASE

A. The Statute

This case focuses on 42 U.S.C. § 1983 which imposes liability for conduct carried out under the color of state law which deprives a person of "rights, privileges, or immunities secured by the Constitution and laws" 42 U.S.C. § 1983.

B. The Facts

The petitioner was tried and convicted by a jury of murder,

felony murder, attempted robbery in the first degree and possession of a weapon. The police investigation of the shooting was conducted by Detectives Cash and defendant Detective Cannon of the New York Police Department.

The conviction was affirmed by the Appellate Division, Second Department and the Court of Appeals of the State of New York. (*See People v. Jackson*, 40 A.D. 2d 1081, *aff'd*, 35 N.Y. 2d 856). (A.67-68). The two affirmances of his conviction at the state court level were *without opinion.*

Petitioner remained incarcerated for approximately eight (8) years until the conviction was overturned in a habeas corpus proceeding, by Order of the United States District Judge for the Southern District, on August 25, 1978. (A.27-66). The District Court in a *lengthy opinion*, overturned the conviction on the ground that the pre-line-up "show-ups" arranged at the station by the officers, were so suggestive as to result in tainted identification testimony at trial, in violation of Petitioner's constitutional right to due process.

> The procedures were so suggestive, in fact, that they gave rise to a very substantial likelihood of irreparable misidentification to the degree that permitting these witnesses to make in court identifications constituted a denial of due process.

(A.49).

The District Court held the officers which arranged the unconstitutional identification "show ups" at the precinct, acted in a "grossly negligent" manner.

In this case, the evidence indicates, that the

> police arranged to have the various eyewitnesses on hand at the station house when petitioner was brought in, that three of the witnesses were afforded a pre-line-up opportunity to see, and in fact did see, the petitioner whether alone or in the company of detectives whom they knew to be working on the Harvey's Lounge case, *and that the police were, at the very least grossly negligent in allowing the show-ups to take place.* This evidence leads me to find the procedures, to put it most charitably, were "impermissibly suggestive.

(A.44, emphasis supplied).

The decision of the United States District Court was subsequently affirmed by the United States Court of Appeals for the Second Circuit on December 19, 1978. (A.17-26).

> We agree with his finding that the identification testimony of three of the four eyewitnesses presented by the State at trial was so tainted by suggestive procedures of the police that its admission into evidence against Jackson constituted a denial of due process.

(A.18).

The Circuit Court concurred, that the record was devoid of evidence connecting Petitioner with the crime and found that this was a rare case "of a record almost entirely bare of credible untainted evidence of guilt". (A.18). The Circuit Court affirmed the prior adjudication of the negligence of the officers during the investigation of petitioner.

It is difficult to understand why the District Attorney of Queens County would have proceeded with the trial of the charges against Jackson on such highly dubious evidence and in light of the incomplete and negligent investigation conducted by the detectives. Neither the press of business, nor the urgency to solve so serious a crime as committed by the gunman can justify the *negligent use of unreliable procedures* in place of thorough and careful investigation." (A. 26, emphasis supplied).

The Circuit Court panel found even the trial judge at the conclusion of the *Wade* hearing commented as to the highly unusual procedures employed by the officers in obtaining identification of Petitioner:

> Presented with the testimony outlined above, the trial judge stated at the conclusion of the *Wade* hearing that the procedure at the stationhouse raised a "very, very serious question" and was "highly unusual". He ruled, however, that Byrd, Webb and Johnson would be permitted to testify at trial, noting only that the stationhouse procedure would not "so contaminate" in-court identifications.

(A.21).

The Circuit Court held the trial judge in arriving at this determination made no detailed findings and applied the wrong legal standards and in fact evidenced a lack of familiarity with appropriate legal standards:

> The state trial judge made no detailed findings either as to suggestiveness or as to reliability and evidenced a basic lack of familiarity with the appropriate legal standards.

(A.24).

C. Prior Proceedings

Petitioner then filed suit against the Police Department of the City of New York and Officer Cannon.[2] The complaint sought monetary recovery based inter alia upon a violation of Petitioner's civil rights. (A.13-16).

Subsequent to the commencement of the action, Petitioner moved for summary judgment. Respondent cross moved to dismiss the complaint. The Supreme Court, Queens County decided these motions and specifically sustained Petitioner's claim based upon the deprivation of his civil rights. The Court denied Petitioner's request for summary judgement on the ground that issues of fact existed which precluded disposition of the civil rights action as a matter of law.

The litigation proceeded until the eve of trial, when Respondents' filed a motion for summary judgement. The Supreme Court, Queens County, by order dated March 5, 1991, granted this motion and dismissed Petitioner's civil rights claim. (A.8-12).[3] It was held Respondent Cannon was entitled to protection under the doctrine of qualified immunity.

> . . . defendant Audrey Cannon's decedent, police officer Harold Cannon, was protected from liability under the doctrine of qualified immunity. Under this doctrine, government officials acting in their official capacity are shielded from liability for civil damages if their conduct does not violate "clearly established

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2. During the course of the proceedings, police officer Harold Cannon died. His wife, Audrey Cannon was appointed the administratrix of his estate.

3. Summary judgment was also granted on behalf of the municipal defendant. The issues pertaining to that denial are not raised before this Court.

> statutory or constitutional rights of which a reasonable persons would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818) In light of the fact that plaintiff's convic'on and the propriety of the officer's actions was unanimously upheld in the state judicial system, this court finds as a matter of law that the officer did not engage in conduct violative of a clearly established right that a reasonable person would have known.

(A.11-12).

On April 19, 1993, a panel of the Supreme Court of the State of New York, Appellate Division affirmed the decision of the Supreme Court. (A.4-7). This opinion set forth no independent basis for the affirmance of the qualified immunity to Respondent Cannon. The Appellate Division denied Petitioner's application for reargument and for leave to appeal to the Court of Appeals. (A.2-3).

A second application for leave to appeal to the highest court of the State, the Court of Appeals was denied by order of the State of New York, Court of Appeals, dated October 14, 1993. (A.1).

REASONS FOR GRANTING THE WRIT

This is a case about federalism. It concerns the effect of conflicting decisions — on the issue of violation cf a constitutional right — between the state and federal courts. This Court must determine, the level of deference a state court should grant to a conflicting federal adjudication, in a subsequent 42 U.S.C. § 1983 action. The issues herein are of major importance to the equal administration of justice and enforcement of the federal civil rights statute, 42 U.S.C. § 1983, by the federal and state courts.

Issues of federalism in a civil rights proceeding, are uniquely within the sole province of this Court. The effect and legal weight to be accorded a federal court determination, in a state court proceeding, involving a federal statute, must be resolved. The problem presented herein, where petitioner has been denied his right as a matter of law, to pursue redress for the violation of his civil rights, because of a prior state court determination, which conflicts with a subsequent federal determination, mandates a statement by this Court requiring uniformity in federal law interpretation.

The state court holding entitles the state forum to ignore a previous federal adjudication that the Constitutional rights of a litigant have been violated, in a subsequent 42 U.S.C. § 1983 proceeding, even though a federal court would be required to give weight to this evidence, under the doctrine of stare decisis. Essentially, the ruling herein, if permitted to stand, will result in the following incongruous application of the federal statute in the state and federal courts. If a state appellate court reverses a conviction, finding there has been a violation of a constitutional right and a subsequent 42 U.S.C. § 1983 action is commenced in *state* court, the court will consider the findings of the state appellate court as evidence of the essential elements of the 42 U.S.C. § 1983 claim. If the reversal of the state conviction, is however, in the federal forum, a state court in determining the essential elements of a 42 U.S.C. § 1983 claim will not consider the violation of the constitutional right, as evidence, if they have previously sustained the conviction. If the litigant, however, commences the 42 U.S.C. § 1983 action in a *federal* court, on the same set of facts and prior proceedings, the federal court findings will be binding on the federal court in the subsequent 42 U.S.C. § 1983 proceeding. The result will be that in order to obtain a fair result in a 42 U.S.C. § 1983 action, a litigant must commence the action in the forum which nullified the conviction. This decision results in unequal protection of a litigant's rights under a federal statute.

The federal court adjudication that the officer acted in a grossly negligent manner, resulting in a violation of Petitioner's right to due process, has been accorded no weight by the state court, in its summary dismissal of Petitioner's action on the grounds that the officer is entitled to a qualified immunity. Evidence of gross negligence specifically precludes summary judgement on the issue of qualified immunity which is predicated on a finding of reasonable conduct as a matter of law. *Fernandez v. Leonard,* 784 F.2d 1209 (1st Cir. 1986); *Doe v. Taylor,* 975 F.2d 137 (5th Cir. 1992); *Washington v. Newsom,* 977 F.2d 991 (6th Cir. 1992); *Houghton v. South,* 965 F.2d 1532 (9th Cir. 1992); *Wood v. Ostrander,* 851 F.2d 1212 (9th Cir. 1988). The state court has elected to recognize, only it's own prior conflicting adjudications, which set forth no reasoned legal opinions and no evaluation of the factual circumstances surrounding the identification procedures. This Court must address the effect of the state court holding in the case at bar, which will create an obstacle to the enforcement of federal rights pursuant to 42 U.S.C. § 1983, contrary to the spirit and intent of that statute.

An important and novel question concerning the impact of federalism upon the civil rights statute, is presented herein for resolution by this Court. The issue of whether the state court holding provides a precedent, contrary to the intent of 42 U.S.C. § 1983, is uniquely within the province of this forum. The civil rights statute, in as much as it was specifically designed to attack the misuse of state power, must be analyzed in this context with respect to its application where issues of federalism are implicated. As this Court's analysis of the statute in *Mitchum v. Foster,* 407 U.S. 225, 92 S. Ct. 2151 (1972) set forth, the legislative history of the predecessor of the civil rights statute confirms, that Congress intended to alter the federal/state relationship with respect to the protection of federal rights. This Court held: "The very function of the statute was to interpose the federal courts between the States and the people as guardians of the peoples federal rights." *supra.*

407 U.S. 225, 242, 92 S. Ct. 2151, 2162. This Court must determine if the intent and function of the statute is undermined, by empowering the state courts with the right to ignore federal findings regarding police conduct in violation of constitutional rights.

This Court must address the issue of whether the legal precedent promulgated by this holding, seriously dilutes a litigant's rights against an officer where the defense of qualified immunity has been raised, where there has been a prior affirmance of a conviction by the state courts — subsequently nullified by the federal judicial system. In doing so, this Court must reconcile federalist principles, with the role of the courts, in deciding upon a qualified immunity, as set forth by this Court in *Harlow v. Fitzgerald,* 112 S. Ct 534 (1982). Specifically, this Court must provide further direction to the lower courts in application of the "objective reasonableness" test set forth in *Harlow, supra*. It must be determined whether courts are permitted to *reject* evidence of conduct in violation of existing Constitutional rights when applying the standard of "objective reasonableness". The state court has, by rejecting or failing to accord any weight to the federal court determination, given credence to only its own prior affirmance of the conviction, and thus interpreted *Harlow, supra,* in this narrow manner. In essence, the state court holding sets forth the standard, that as long as a conviction has been affirmed by the state courts — even if no written opinion is set forth as to the propriety of the officer's actions — and despite the fact that the conviction was nullified in the federal forum on the specific finding that the procedures employed violated due process — any subsequent 42 U.S.C. § 1983 action brought in that state court must be dismissed. Essentially the rule being articulated, based upon interpretation of *Harlow, supra,* is that the mere affirmance of a conviction on the state court level irrespective of a conflicting subsequent federal determination will result in an automatic bar to

a 42 U.S.C. § 1983 action in the state forum because of the standard of "objective reasonableness".

To the extent that this Court determines rejection of this evidence is incompatible with the spirit and intent of the Civil Rights statute and *Harlow, supra,* this Court must further define the parameters of "objective reasonableness" and its relationship to conflicting determinations between the state and federal forums. The state court holding, in essence, interprets *Harlow, supra,* to mandate automatic protection of a qualified immunity without further inquiry, where the conviction has been affirmed. The thrust of the state court determination is that the mere fact that two different forums disagree on a conviction, presents evidence, in and of itself that the officer cannot be deemed to have violated clearly established law. This Court must settle the issue as to whether on a motion for summary judgment on the issue of qualified immunity, the courts are permitted to draw such an inference and give no weight to a conflicting decision. The application of "objective reasonableness" must be further analyzed and interpreted by this Court, where the conflict of a state court affirmance, without opinion and a federal court determination to nullify a conviction, with a very lengthy analysis of the manner in which the conduct in question violated existing law and exceeded reasonable conduct, is presented.[4] This Court must address the issue of whether under the standard of "objective reasonableness", it is permissible for a court to infer that the fact

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4. The federal court analysis in the habeas corpus proceeding sets forth a clear determination that the conduct of the officers violated existing law at the time of the procedures in accord with the prior holdings of this Court relating to proper identification procedures. The federal appellate courts specifically found, the officer acted in a grossly negligent manner, in violating law which was clearly established at the time of the identification of Petitioner. This determination is further supported by the police training manuals and rule books and testimony of Respondent Cannon which were set forth as evidence for the court.

that two courts reach a different conclusion with respect to a conviction, requires an automatic determination that the law at the time the officer engaged in the conduct, was unsettled or unclear.

This Court must promulgate some direction or guidance to courts on the weight to accord adverse and conflicting findings, which are germane to the issue of violation of constitutional rights, in the context of deciding upon the issue of a qualified immunity in a civil rights action. In doing so, a determination as to the level of deference courts should grant to a conflicting determination, on the same facts, in a different forum must be rendered. This Court must promulgate a holding which would avoid conflicting decisions between the state and federal courts on the issue of qualified immunity in a federal civil rights proceeding and which would serve to promote unity and equal protection of the rights embodied in the federal statute, in the state and federal forums.

CONCLUSION

The present case offers an opportunity for this Court to consider and expound upon the problem of conflicting state and federal court interpretations of federal Constitutional rights and the role of federalism as it impacts upon the rights of a litigant pursuant to 42 U.S.C. § 1983 and to further interpret the role of the court in determining the weight to accord evidence on a motion for summary judgment on the issue of a qualified immunity.

Respectfully submitted,

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(212) 244-4187

Dated: December 20, 1993

APPENDIX A — FINAL ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK DATED OCTOBER 14, 1993

STATE OF NEW YORK,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth *day of* October 1993

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 897

Edmond Jackson,

Appellant,

v.

Police Department of the City of New York, et al.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

s/ Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED JULY 9, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

THOMAS R. SULLIVAN, J.P.
ALBERT M. ROSENBLATT
CHARLES B. LAWRENCE
CORNELIUS J. O'BRIEN, JJ.

91-04851

Edmond Jackson, appellant, v Police Department of the City of New York, et al., respondents.

DECISION & ORDER ON MOTION

Motion by the appellant for reargument of an appeal from an order of the Supreme Court, Queens County, dated May 5, 1991, which was determined by decision and order of this court dated April 19, 1993, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

SULLIVAN, J.P., ROSENBLATT, LAWRENCE and O'BRIEN, JJ., concur

Appendix B

ENTER:

July 9, 1993

Martin H. Brownstein
Clerk

APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT DATED APRIL 19, 1993

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIALDEPARTMENT

Argued — March 2, 1993

— AD2d —
THOMAS R. SULLIVAN, J.P.
ALBERT M. ROSENBLATT
CHARLES B. LAWRENCE
CORNELIUS J. O'BRIEN, JJ.

91-04851

Edmond Jackson, appellant, v Police Department of the City of New York, et al., respondents.

DECISION AND ORDER

Weingrad & Weingrad, P.C., New York, N.Y. (Penny Shemtob and Michael Simmons of counsel), for appellant.

O. Peter Sherwood, Corporation Counsel, New York, N.Y. (Leonard Koerner and Fay Leoussis of counsel), for respondents.

In an action to recover damages for violation of his Federal constitutional rights under 42 USC § 1983, the plaintiff appeals from an order of the Supreme Court, Queens County (Lerner, J.), dated March 5, 1991, which granted the defendants' motion for summary judgment dismissing the complaint.

Appendix C

ORDERED that the order is affirmed, without costs or disbursements.

The plaintiff was tried and convicted of murder, felony murder, attempted robbery in the first degree, and unlawful possession of a weapon. The conviction was upheld by this court (*see, People v Jackson*, 40 AD2d 1081) and, subsequently, by the Court of Appeals (*see, People v Jackson*, 35 NY2d 856). Thereafter, The United States District Court for the Southern District of New York, in a habeas corpus proceeding, vacated the conviction, holding that the identification procedure was so suggestive as to unconstitutionally taint the in-court identifications by the witnesses (*see, Jackson v Fogg*, 465 F Supp 177). The United States Court of Appeals for the Second Circuit affirmed (*see, Jackson v Fogg*, 589 F2d 108).

The plaintiff then commenced this action to recover damages for false arrest, false imprisonment, and deprivation of civil rights. Upon the defendants' motion, the plaintiff's causes of action sounding in false arrest and false imprisonment were dismissed for failure to serve timely notice of claim. However, the claim sounding in deprivation of civil rights was held to be timely.

Subsequently, the defendants moved to dismiss the civil rights cause of action. The court dismissed that cause of action, finding that the plaintiff had failed to plead and, indeed, could not prove that the defendant City had a custom or policy that caused the alleged deprivation of his civil rights, and that the defendant Harold Cannon was protected by the qualified immunity doctrine. We find that the motion was properly granted.

A municipality can be found liable under 42 USC § 1983 for deprivation of constitutional rights only where the municipality

itself causes the constitutional violation at issue (*see, Monell v New York City Dept. of Social Servs.*, 436 US 658). It cannot be held liable pursuant to 42 USC § 1983 based solely upon the doctrine of respondeat superior or vicarious liability (*see, City of Canton, Ohio v Harris*, 489 US 378; *Batista v Rodriguez*, 702 F2d 393). To prevail on a cause of action to recover damages pursuant to 42 USC § 1983 against a municipality, the plaintiff must specifically plead and prove (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right (*see, Monell v New York City Dept. of Social Servs., supra; Batista v Rodriguez, supra; Willinger v Town of Greenburgh*, 169 AD2d 715, 716). Where the plaintiff seeks to establish that the municipality is liable by virtue of the inadequate training of its police officers, the plaintiff must plead and prove that the municipality's failure to train its police officers in a relevant respect evidences a deliberate indifference to the rights of its inhabitants (*City of Canton, Ohio v Harris*, 489 US 378, 389-390, *supra*).

The plaintiff in this case failed to show that the city did not adequately train its police officers. Indeed, in opposing the defendants' motion, the plaintiff presented an affidavit of his expert, a former sergeant in the police department, which stated merely that "[t]he procedures employed by the officers and detectives in this matter were incorrect and in violation of the existing policy, practices and procedures of the New York City Police Department". A city would not be automatically liable pursuant to § 42 USC 1983 if one of its employees happened to apply its policies in an unconstitutional manner, for liability may not rest on the doctrine of respondeat superior (*see, City of Canton, Ohio v Harris, supra*, at 1203). The plaintiff also failed to set forth evidence of municipal supervisory indifference on the part of the municipality, such as acquiescence in a prior pattern of conduct,

from which a custom or policy could be inferred (*see, Turpin v Mailet*, 619 F2d 196, *cert denied* 449 US 1016).

We have considered the plaintiff's remaining contentions and find them to be without merit.

SULLIVAN, J.P., ROSENBLATT, LAWRENCE and O'BRIEN, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

APPENDIX D — ORDER AND MEMORANDUM OF THE NEW YORK SUPREME COURT, QUEENS COUNTY DATED MARCH 5, 1991

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: Honorable *Alfred D. Lerner* IAS PART 1
Justice

Cal. No.

Index No. 17404/79

Motion
Date:

Motion Cal. No.

EDMOND JACKSON

Plaintiff(s)

-against-

POLICE DEPARTMENT OF THE CITY OF NEW YORK, et al.

Defendant(s)

The following papers numbered 1 to 10 read on this motion by defendants to dismiss complaint for failure to state a cause of action, or alternatively for summary judgment.

Appendix D

	Papers Numbered
Notice of Motion – Affidavits – Exhibits	1-4
Answering Affidavits – Exhibits	5-8
Reply Affidavits	9-10

Upon the foregoing papers it is ordered that the motion for summary judgment is granted.

See memorandum on file.

Date: March 5, 1991

s/ Alfred D. Lerner
J.S.C.

Appendix D

SUPREME COURT, QUEENS COUNTY
1A PART 1

BY: LERNER, J.

INDEX NO. 17404/79

DATE: MARCH 5, 1991

EDMOND JACKSON

-against-

POLICE DEPARTMENT OF THE CITY OF NEW YORK, et al.

MEMORANDUM

In this action to recover damages based on a violation of plaintiff Jackson's Federal constitution rights under 42 USC § 1983, defendants move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a)(7), or alternatively, for summary judgment pursuant to CPLR 3212.

The facts in this case are not in dispute. On or about July 13, 1970 plaintiff was arrested and subsequently convicted of murder, felony murder, attempted robbery in the first degree and possession of a weapon. These convictions were affirmed by both the Appellate Division, Second Department and the Court of Appeals of the state. (*See, People v Jackson*, 40 AD2d 1081, *affd* 35 NY2d 856.) On August 5, 1978 plaintiff's conviction was reversed, upon a petition for a writ of habeas corpus, by the U.S. District Court for the Southern District of New York. Plaintiff subsequently instituted an action in state court for false arrest, false imprisonment and violation of his civil rights. By order dated February 7, 1984, the court dismissed plaintiff's actions for false

arrest and false imprisonment, but preserved plaintiff's civil rights action.

It is well established that to prevail on a 42 USC § 1983 claim against a municipality, the claimant must specifically plead and prove the following elements: (1) an official policy or custom that (2) causes the claimant to be subjected to (3) a denial of a constitutional right. (*Monell v Department of Social Services of the City of New York*, 436 US 658; *Batista v Rodriguez*, 702 F2d 393 [2d Cir 1984]; *Willinger v Town of Greenburgh*, __ AD2d __, 564 NYS2d 466.) The failure to plead adequately any one of these elements will render the civil rights claim inadequate as a matter of law. (*See, Willinger v Town of Greenburgh, supra.*)

Applying this standard to the matter herein, the plaintiff has failed to plead and prove specifically the existence of an official policy or custom which deprived plaintiff of a constitutional right. In his complaint, plaintiff alleges only one isolated incident of police misconduct. A municipal policy may not be inferred from a single incident. (*See, City of Oklahoma City v Tuttle*, 471 US 808.) Accordingly, plaintiff's civil rights claim is inadequate as a matter of law.

Furthermore, defendant Audrey Cannon's decedent, police officer Harold Cannon, was protected from liability under the doctrine of qualified immunity. Under this doctrine, government officials acting in their official capacity are shielded from liability for civil damages if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v Fitzgerald*, 457 US 800, 808.) In light of the fact that plaintiff's conviction and the propriety of the officer's actions was unanimously upheld by the state judicial system, this court finds as a matter of law that the officer

did not engage in conduct violative of a clearly established right that a reasonable person would have known.

Accordingly, defendants' motion for summary judgment is granted.

Short form order signed.

s/ Alfred D. Lerner
J.S.C.

APPENDIX E — SECOND AMENDED COMPLAINT DATED MARCH 25, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No. 17404/79

EDMOND JACKSON,

Plaintiff,

-against-

POLICE DEPARTMENT OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, and "JOHN" CANNON and "MOE" CASH, the first names being unknown and fictitious,

Defendants.

SECOND AMENDED COMPLAINT

The plaintiff, EDMOND JACKSON, as and for his complaint, by his attorneys, WEINGRAD AND WEINGRAD, P.C., herein alleges as follows:

1. That at all times had herein the defendant, THE CITY OF NEW YORK, was and still is a municipal corporation, duly organized and existing under and by virtue of the laws of the State of New York, and that prior hereto and on or about the 3rd day of July, 1979, the plaintiff caused to be served a written verified notice of claim on the municipal defendants pursuant to statute.

2. That more than thirty (30) days after elapsed since the service of said notice of claim and adjustment of payment thereof has been neglected or refused.

Appendix E

3. That served in conjunction with this second amended complaint is served an amended notice of claim pursuant to the order of the Appellate Division, 2nd Department, Hon. Milton Mollen, Presiding Justice, a copy of which is annexed hereto.

4. That said amended notice of claim and second amended complaint are hereby duly served within twenty (20) days after service of said order pursuant to the direction of said order.

5. That the plaintiff has duly submitted to an inquiry concerning the justness of his claim on September 26, 1979.

6. That this action had originally been commenced within one (1) year and ninety (90) days after the cause of action of plaintiff accrued.

7. That plaintiff has duly complied with all of the conditions precedent to the commencement of this action.

8. Upon information and belief, that at all times hereinafter mentioned, the defendant, THE CITY OF NEW YORK, employed the warrant officers, policemen, jailers, warden, magistrates, court attendants, clerks, and others hereinafter mentioned to this complaint.

9. Upon information and belief, the defendant, THE CITY OF NEW YORK, owned, maintained and controlled the various courthouses, jails and their equipment, police stations, the vans used to transport prisoners, all hereinafter mentioned in this complaint.

10. That heretofore and on or about July 14, 1970, plaintiff was arrested by police officers of THE CITY OF NEW YORK,

pursuant to a void warrant, such warrant not having been issued as required by law.

11. That subsequent thereto the defendants acting through members of the Police Department, by Detectives "John" Cannon and "Moe" Cash, the first names being unknown and fictitious, and District Attorneys, and other employees of THE CITY OF NEW YORK, conspired to deprive plaintiff of his civil rights, in that they conspired to have plaintiff identified by witnesses as the perpetrator of a crime in a highly improper and suggestive manner.

12. That the arrest of the plaintiff, EDMOND JACKSON, was unlawful and improper in that said arrest was without probable cause, in violation of Police Department rules, State and Federal regulations and mandated procedures.

13. That plaintiff was tried and convicted of the crime of murder and sentenced to serve twenty (20) years to life in prison.

14. That plaintiff was imprisoned from on or about July 14, 1970 up to and including on or about December 22, 1978 when the reversal of his conviction was upheld by the Second Circuit, Court of Appeals.

15. That such commitment was void on its face.

16. That such commitment was known to be based on an unconstitutional sentence; and that the imprisonment of plaintiff violated his legal and constitutional rights.

17. That on April 6, 1979 it was ordered by the Honorable Vincent J. Broderick that said conviction be declared null and void.

Appendix E

18. That as a result of the false arrest, illegal imprisonment and conspiracy to deprive plaintiff of his civil rights, plaintiff's health was impaired, plaintiff suffered great mental distress, was humiliated, his reputation and character were injured, his earning power permanently impaired, including loss of a home, all to the plaintiff's damage in the sum of Ten Million ($10,000,000.) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendants in the sum of Ten Million ($10,000,000.) Dollars, together with the costs and disbursements of this action.

Dated: New York, New York
March 25, 1982

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APPENDIX F — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED DECEMBER 19, 1978

EDMOND JACKSON,

Petitioner-Appellee,

v.

WALTER FOGG, Superintendent, Green Haven Correctional Facility,

Respondent-Appellant.

No. 421, Docket 78-2107.

United States Court of Appeals,
Second Circuit.

Argued: Nov. 17, 1978
Decided: Dec. 19, 1978

Thomas S. O'Connor, Deputy Asst. Atty. Gen., New York City (Louis J. Lefkowitz, Atty. Gen. of State of N. Y., New York City, on the brief; Samuel A. Hirshowitz, First Asst. Atty. Gen., New York City, of counsel), for respondent-appellant.

Helen Bodian, New York City (Prisoner's Legal Services of New York) for Petitioner-Appellee.

Before: LUMBARD, FRIENDLY and OAKES, Circuit Judges.

LUMBARD, Circuit Judge:

Edmond Jackson's petition for habeas corpus to set aside his

conviction for murder in Queens County presents the rare case of a record almost entirely bare of credible untainted evidence of guilt. At the same time, the state's appeal reminds us of the great care we must exercise before setting aside a conviction for so serious an offense, particularly when it has been unanimously affirmed by the New York Appellate Division and Court of Appeals.

After consideration of Jackson's petition and examination of the records of the trial and his appeals to the New York courts, Judge Broderick, in the Southern District, granted the petition in a decision and order, dated August 25, 1978. We agree with his finding that the identification testimony of three of the four eyewitnesses presented by the State at trial was so tainted by suggestive procedures of the police that its admission into evidence against Jackson constituted a denial of due process.

At 1:30 A.M. on Sunday, June 14, 1970, an armed man entered Harvey's Lounge in Jamaica and announced, "This is a stickup." The gunman's words threw the lounge into an uproar as the 40 to 60 customers scrambled for cover. After a brief interval, the gunman stepped forward and fired one shot, mortally wounding Harold Dixon who was tending bar.

The police investigation of the shooting was conducted by Detectives Cash and Cannon of the New York Police Department. They were unable to locate any tangible evidence as to the identity of the gunman and consequently focused their attention on four persons who came forward as eyewitnesses: Mary Phifer, Edward Byrd, Willie Johnson and Joseph Webb.

According to the four eyewitnesses' subsequent testimony, none of them had ever seen the gunman before the night of the shooting and on that occasion they observed him only for the few

seconds it took them to turn away and scramble for cover. Webb was tending bar when he heard the commotion, looked toward the door and saw a man holding a gun in his left hand. As the man moved toward the bar and fired a shot, Webb immediately dropped to the floor and crawled to the back of the room. He stated that he did not see a gunman after the shot was fired and that he had observed him for a total of "maybe two, three seconds or minute might have been a minute."

Byrd, Johnson and Phifer were sitting at the front end of the bar talking to each other. Byrd and Phifer were seated with their backs to the door, only four or five feet away. Byrd and Phifer first noticed the gunman when he said, "This is a stickup." Johnson pushed Phifer off her bar stool and all three of them ran to the back of the bar after which they heard the shot.

In the days following the shooting the four eyewitnesses were shown a large number of mugshots, and, on June 18th, Phifer stated that photographs of a John Walker and a Veryl Walker "strongly resembled" the gunman. The three other witnesses confirmed the resemblance. Although John Walker was in prison at the time of the shooting, the tentative identification of Veryl Walker offered an apparently promising lead, since Detectives Cash and Cannon had previously been told by an informer that Veryl Walker was the Harvey's Lounge gunman. But, despite this seeming break in the case, the detectives made only sporadic attempts to find Veryl Walker[1] and ended their search for him altogether on July 13th, the day Edmond Jackson was brought into the investigation.

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1. The informer had also supplied the detectives with Veryl Walker's alleged address. The detectives made one trip to that address but did not locate Walker. Detective Cannon testified at trial that he had also checked with the Post Office, "telephone records," and people in the street in an effort to locate Walker, but conceded that the search ended when Edmond Jackson was taken into custody.

Appendix F

How the detectives' investigation came to focus on Jackson remains unclear. Cannon testified at the pre-trial Wade[2] hearing, which was held the day before the trial in March of 1971 to determine the propriety of the identification process, that Jackson was taken to the stationhouse on July 13th for reasons having nothing to do with the Dixon shooting. He indicated that Jackson became a suspect only when Webb, who also "happened" to be at the stationhouse, saw Jackson and told the detectives that he was the man who shot Dixon. Cash's account differs; he testified at the hearing that Jackson was already under investigation when he was taken to the stationhouse and that Webb had been notified to "stand-by" in case he was needed to make an identification. Though Cannon's subsequent testimony at trial tended to follow Cash's version of the facts,[3] neither detective explained nor does the record otherwise reveal what information led the police to suspect Jackson of the crime.

What is clear from the record is that all four eyewitnesses came to the stationhouse on July 13th and identified Jackson in two separate line-ups of the same six black men. The reliability of those identifications was, of course, the focus of the state court Wade hearing, and the eyewitnesses' testimony as to the circumstances surrounding their identifications of Jackson is illuminating. Byrd stated that he had stopped at Harvey's Lounge on his way home from work. Cash and Cannon picked him up there and drove him to the stationhouse. On the way, Cash told Byrd that "he found the fellow who shot Harold Dixon." While in the detectives' office Byrd, after spotting Jackson through a two-way glass sitting by himself in a back room, identified Jackson as the gunman.

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2. United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967).

3. For reasons unclear from the record, Detective Cash did not testify at Jackson's trial.

Appendix F

Webb explained that he was called by a police officer who asked him to come to the stationhouse "to see if I could pick out the individual who did the shooting." Cash met him at the desk and as they were walking to the detective room Webb saw Jackson and one other person sitting together some 15 to 20 feet away. At that point he told Cash that Jackson was "the fellow that shot Harold."

According to Johnson's Wade testimony, he came to the stationhouse in response to a message left at his home that the police "had somebody down there that they wanted me to look at in a line-up." While Johnson was in a waiting room near the detectives' office he noticed Jackson in an adjoining room. A little later, Cash and Jackson walked past Johnson as he sat in the waiting room.

Mary Phifer, who had arrived at the stationhouse after the others, was the only witness who denied seeing Jackson prior to the two line-ups.

Presented with the testimony outlined above, the trial judge stated at the conclusion of the Wade hearing that the procedure at the stationhouse raised a "very, very serious question" and was "highly unusual." He ruled, however, that Byrd, Webb and Johnson would be permitted to testify at trial, noting only that the stationhouse procedure would not "so contaminate" in-court identifications.

Jackson's trial commenced one day after the Wade hearing ended. Each of the four eyewitnesses testified as to the incident at Harvey's Lounge and each of them identified Jackson as the man who shot Harold Dixon.[4] The state presented no other evidence

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4. Over defense objections, Phifer was permitted to testify regarding her stationhouse identification of Jackson. At the same time, the court ruled that it would

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linking Jackson to the crime.[5] After some four hours of deliberation, the jury found Jackson guilty. His conviction was unanimously affirmed, without opinion, by the Appellate Division. 40 A.D.2d 1081, 337 N.Y.S.2d 1005 (2d Dept. 1972). The Court of Appeals also affirmed unanimously, also without opinion. 35 N.Y.2d 856, 363 N.Y.S.2d 580, 322 N.E.2d 272 (1974).

Judge Broderick conducted his review of the record in

(Cont'd)
not allow the State to bring out the stationhouse identifications by the other three witnesses since they had seen the defendant at the stationhouse prior to the line-up. Fearing that discussion of their prior identifications would bolster the in-court testimony of Byrd, Webb and Johnson, Jackson's counsel decided, understandably enough, not to go into this matter on his own.

5. Jackson did not testify in his own behalf but based his defense on the testimony of three alibi witnesses. Notice of their testimony was given to the State some days prior to its use as required by New York Code of Criminal Procedure § 295-L. In rebuttal the State produced testimony and evidence as to which no notice was either required or given. The absence of reciprocity in N.Y.C.C.P. § 295-L was held to render the statute unconstitutional in People v. Bush, 33 N.Y.2d 921, 352 N.Y.S.2d 936, 308 N.E.2d 451 (1973), Cert. denied, 419 U.S. 848, 95 S.Ct. 85, 42 L.Ed.2d 77 (1974), a decision that followed the Supreme Court's ruling in Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973), that a similar Oregon statute was unconstitutional. The Court in Wardius gave no indication as to whether its decision was to be applied retroactively, and the New York Court of Appeals declined to apply Bush to cases the trial of which began before the decision in Wardius, except where application of the notice of alibi statute resulted in the exclusion of alibi evidence. Judge Broderick found, however, that Jackson was materially prejudiced by the failure of New York law to require that the State give notice of its rebuttal evidence, and cited that conclusion as an alternative ground for the grant of habeas relief. In view of our holding that the conviction cannot stand because the State's case was so tainted by the identification procedures and the testimony resulting therefrom we need not deal with the interesting questions of prejudice and retroactivity that Judge Broderick's holding presents.

accordance with the two-step process suggested in Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1973), which requires a determination of whether the identification process was impermissibly suggestive and, if so, whether it was so suggestive as to raise "a very substantial likelihood of irreparable misidentification." Id. at 198, 93 S.Ct. at 381, citing Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) see Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977). With regard to the first part of that test, Judge Broderick concluded that the stationhouse procedures were suggestive, noting that the police arranged to have the eyewitnesses on hand when Jackson was brought in and that three of the eyewitnesses had a pre-lineup opportunity to see Jackson. While acknowledging that the pre-lineup confrontation in this case may simply have been the result of police negligence, the district judge correctly observed that the Supreme Court has found "show-up" procedures to be suggestive. E.g., Neil v. Biggers, supra. Previous decisions of this Circuit also support his conclusion. E.g., United States ex rel. Lucas v. Regan, 503 F.2d 1 (2d Cir. 1974).

Addressing the second part of the test, Judge Broderick, consistent again with the teaching of Neil v. Biggers, supra, measured the reliability of the in-court identifications against the "totality of circumstances," with specific reference to "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation," Id. 409 U.S. at 199-200, 93 S.Ct. at 382. He found:

> (1) that the witnesses did not have a good opportunity to view the gunman;

(2) that they had little motivation to study the gunman's face and every reason to turn and run;

(3) that there was no evidence of how the witnesses initially described the gunman (and therefore no basis for comparison);

(4) that the witnesses appeared to have displayed varying degrees of certainty at the stationhouse; and

(5) that a considerable amount of time (one month) had elapsed between the crime and the confrontation.

The record fully supports these findings, and clearly warrants Judge Broderick's conclusion that the likelihood of misidentification by Byrd, Webb and Johnson was sufficiently great to make the use of their trial identifications of Jackson a denial of due process.

We must also reject the State's contention that the trial court's ruling at the Wade hearing is entitled to presumptive weight under 28 U.S.C. § 2254(d). The state trial judge made no detailed findings either as to suggestiveness or as to reliability and evidenced a basic lack of familiarity with the appropriate legal standards. Under all the circumstances disclosed by the record and in light of the unsupported conclusions of the state trial judge, the district court quite properly made its own assessment of the undisputed facts and correctly applied the governing principles. See United States ex rel. Williams v. La Vallee, 487 F.2d 1006 (2d Cir. 1973), Cert. denied, 416 U.S. 916, 94 S.Ct. 1622, 40 L.Ed.2d 118 (1974).

Appendix F

Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable, especially where unsupported by corroborating evidence.

As Glanville Williams has noted in The Proof of Guilt, (3d ed. 1963),

> "In England and America most of the spectacular miscarriages have been due to wrong identification of the defendant as a culprit." *Id.* at 106.

See also, Borchard, Convicting the Innocent: Errors of Criminal Justice (3d ed. 1970); B. Frank & J. Frank, Not Guilty, (1957). The dangers of convicting on identification testimony alone are well known to those whose duty it is to prosecute crime. Yet here the prosecutor and the police were content to consider the case solved in reliance on questionable identification procedures and despite the fact that positive information regarding other suspects had been called to their attention.[6]

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6. Veryl Walker was not the only alternative suspect that the police were aware of. In early February 1971, petitioner's assigned counsel, Leroy Kellam, brought to the attention of the District Attorney information he had received that the shooting had been committed by one Anthony Carolina, then being held for another attempted holdup of a Queens bar. Kellam pointed out that Carolina, whom he had visited in jail closely resembled Jackson and he asked that a new line-up including Carolina be conducted. He also moved in the Supreme Court for an order requiring such a line-up. The court denied the motion and the District Attorney refused to do as requested. Carolina was later convicted for attempted murder, and, after his conviction was reversed, he pleaded guilty to attempted robbery for which he is presently serving a 15

(Cont'd)

Appendix F

It is difficult to understand why the District Attorney of Queens County would have proceeded with the trial of the charges against Jackson on such highly dubious evidence and in light of the incomplete and negligent investigation conducted by the detectives. Neither the press of business, nor the urgency to solve so serious a crime as that committed by the gunman can justify the negligent use of unreliable procedures in place of thorough and careful investigation.

We affirm the judgment of the district court and direct that our mandate issue forthwith. We leave it to the district court to pass on the petitioner's application to be released from custody in light of what the State has indicated to be a very remote possibility of retrial.

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year sentence of imprisonment. The above is set forth in affidavits attached to Jackson's petition and is not denied by the State. The above is set forth in affidavits attached to Jackson's petition and is not denied by the State.

APPENDIX G — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 25, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 Civ. 3284 (VLB)

EDMOND JACKSON,

Petitioner,

-against-

WALTER FOGG, Superintendent, Green Haven Correctional Facility,

Respondent.

VINCENT L. BRODERICK, U.S.D.J.

I.

This is a petition for writ of habeas corpus under 28 U.S.C. § 2254. The petitioner, Edmond Jackson, is currently imprisoned at the Green Haven Correctional Facility in the State of New York. He was convicted, after a jury trial, of murder, felony murder, attempted robbery in the first degree, and possession of a weapon, and sentenced to two terms of twenty years to life, a term of three to fifteen years and a term of three to seven years, all terms to be served concurrently. The Appellate Division, Second Department, and the New York Court of Appeals both affirmed the conviction without opinion, *People v. Jackson*, 40 A.D.2d 1081, 337 N.Y.S.2d 1005 (1972), Aff'd, 35 N.Y.2d 856, 363 N.Y.S.2d 580, 322 N.E.2d 272 (1974).

Appendix G

Petitioner here advances three claims: (1) that the trial testimony of three of the four eyewitnesses to the crime was tainted by an overly suggestive pre-lineup procedure; (2) that petitioner should have been allowed to conduct a new lineup so that the eyewitnesses could have had the opportunity to identify another suspect; and (3) that petitioner was unfairly and prejudicially surprised at trial as a result of a New York statute which required defendants to give notice of their intended alibi witnesses, but did not require the prosecution to give notice of alibi rebuttal testimony.

Since I find that the trial testimony of three witnesses was tainted to a constitutionally impermissible degree by pre-trial "show-ups," I grant the petition. I also grant the petition on the basis of the application to petitioner's trial of New York's alibi statute, N.Y. C.C.P. §295-L.

II.

1. *The Killing at Harvey's Lounge.*

The crimes in question occurred on June 14, 1970 in the middle of the night in a crowded but well-lit bar — Harvey's Lounge — on Sutphin Boulevard in Jamaica, Queens. Four witnesses who would later identify petitioner as the perpetrator were inside the bar, together with 40 to 60 other people. Joseph Webb tended the bar. Mary Phifer, Edward Byrd, and Willie Johnson were customers sitting at the bar within 10 feet of the door. About 1:30 in the morning a man holding a gun and standing near the door announced, "This is a stick up." The gunman's words threw the Lounge into an uproar as the screaming customers rushed to the back of the bar. In the midst of the commotion, the gunman strode to the bar, levelled his pistol and fired once, wounding

Harold Dixon, who along with Webb, had been tending the bar. Dixon died ten days later.

2. *The Investigation*

Detectives William Cash and Harold Cannon of the New York City Police Department arrived at the scene shortly after the shooting took place and began an investigation. Since the gun was never recovered and no relevant fingerprints could be found, the detectives focused their attention on persons they identified as eyewitnesses Phifer, Johnson, Byrd and Webb. The record does not indicate whether, apart from those four who testified, any of the 40 to 60 persons in the Lounge at the time of the incident had an opportunity to observe the gunman.

The four eyewitnesses gave varying estimates as to the amount of time each of them had had to observe. None of them had ever seen the gunman before that night.

Webb testified at the *Wade* hearing that he had observed the gunman for "about may two, three seconds or [a] minute — might have been a minute." (*Wade* Hearing ("H") at 7). At the trial he stated that after the shot, he dived behind the bar and crawled to the rear. (Trial Transcript ("T") at 181-82).

Mary Phifer was sitting at the bar next to Willie Johnson with her back to the door. She heard the gunman announce the holdup, turned, saw the man holding the gun, and nudged Johnson. Johnson then pushed her to the floor of the bar and told her to "[m]ake it to the bathroom." (T. 66-69). She went straight to the bathroom and arrived there before any of the other patrons (*Id.*). She claimed to have observed the gunman for between eight and fifteen seconds (T. 71, H. 63).

Appendix G

Willie Johnson testified that he heard the gunman's words, turned and saw the man holding the gun, immediately knocked Phifer off her stool and then hurried out of harm's way. At various times he claimed to have observed the man for periods of from two (T. 142) to 60 (H. 79) seconds, but he stated at one point that he "couldn't say how long it was" (T. 163).

Edward Byrd testified that he had "glanced at" the gunman in the bar 15 minutes before shooting took place (T. 162). When the holdup was announced, Byrd turned, observed the gunman for four or five seconds, and ran to the back of the bar. He was lying on the floor when the shot rang out (T. 120-22).

Over the next several days, after the incident, the four eyewitnesses were shown a large number of mugshots. Finally on June 14, 1970, Mary Phifer selected two pictures of men who, she said, "strongly resembled" the gunman. Johnson, Byrd and Webb later confirmed Phifer's reaction.

The pictures were of a "Veryl Walker" and a "John Walker". Although John Walker was in prison at the time of the shooting, the identification of Veryl Walker provided an apparently promising lead. On June 16, an informer told Detective Cash that a man named "Snake" had committed the murder. He also said that "Snake" and Veryl Walker were the same person. Cannon made one visit to an address given by the informant in an unsuccessful effort to find Walker but he ended his efforts on the day that Edmond Jackson was apprehended.

3. *The Lineups.*

Petitioner was identified in two successive lineups by the four eyewitnesses on July 13, 1970 at a stationhouse in Queens. How

the petitioner got there and how the eyewitnesses happened to be at the stationhouse is not entirely clear due, in major part, to contradictory testimony from the detectives, Cash and Cannon, who were together throughout the day (H. 134-35, 161, 167, 185, 190).

At the *Wade* hearing, which was held (on the day before petitioner's trial) to establish whether there were any improprieties regarding the identification process, Detective Cannon testified that he and Cash "happened to be cruising around in the neighborhood" where petitioner lived (H. 134). They were not "working on any information that lead . . . to Edmond Jackson" (H. 158). The two bumped into Jackson, and Cannon struck up a conversation. Petitioner said he was looking for a tenant for his house in hopes of easing the mortgage payments. Cannon suggested that they go down to the stationhouse and call an acquaintance of Cannon's who might be interested in leasing. (H. 159). Arriving at the station, the two detectives and petitioner walked up the stairs and into the detective room. According to Cannon, just inside the door of that room sat Webb, the bartender who had been at the lounge on the night of the shooting and who had been cooperating with the police in the investigation. The detectives and petitioner walked directly past Webb and into a back room (H. 135). Webb then called Detective Cash back into the outer room and informed him that petitioner was the gunman. (H. 164). Cannon testified that Webb said that he "came up to see if anything had developed in the case" (H. 167). Petitioner, again according to Cannon, was placed under arrest and was given the *Miranda* warnings (H. 136-38).

At trial, Cannon told a different story. He then said that he and Cash were actively seeking Jackson in relation to the investigation (T. 222-23). But moments later, confronted with his *Wade*

testimony, Cannon acknowledged that they had no information about Jackson "with reference to a crime." (T. 224).

An explanation for the discrepancies in Cannon's testimony may lie in the fact that Cannon had the benefit of hearing Detective Cash's *Wade* hearing testimony before giving his trial testimony. Cash, who did not appear at the trial, testified that he and Cannon had driven to Jackson's house "to further conduct this homicide investigation and talk with Jackson" (H. 189). Cash had previously contacted Webb and "other people" and had asked them "to stand by" in case they had to be called in to view a lineup (H. 182).

Cash's description of the initial conversation with petitioner (regarding Jackson's desire to find a tenant) was similar to that of Cannon (H. 134). Once in the car, according to Cash, petitioner was advised that he was under suspicion of criminal activities and was informed of his *Miranda* rights (H. 180-81). Upon arrival at the stationhouse petitioner was told that he was suspected of committing the Harvey's Lounge murder. Petitioner denied having ever been at Harvey's Lounge (H. 182-83).

Cash made no mention of the encounter with Webb, so carefully described by Cannon. He said that he did not see Webb until sometime after the three had arrived at the stationhouse (H. 185), and that Webb did not say anything to him (H. 186). After the petitioner had been questioned briefly, "the witnesses in question were phoned and told to appear at the stationhouse" (H. 183). Cash also said that he did not bring any witnesses to the station that day to identify Jackson (H. 201). This brings us to Edward Byrd's *Wade* hearing testimony.

On July 13th, the day of the lineup, Byrd had stopped by Harvey's Lounge on his way home from work. He testified that

Appendix G

Detectives Cash and Cannon picked him up at the bar and drove down to the stationhouse (H. 132). On the way, Cash told Byrd that "he found the fellow who shot Harold Dixon" (H. 133). Arriving at the stationhouse, the detectives escorted Byrd into their office. Once in the office, Byrd noticed the petitioner sitting by himself in a back room. Spotting him through the "two-way glass," Byrd identified Jackson as the gunman. (H. 116-117).

Webb's account of the pre-lineup events also differed from that given by the detectives. Webb testified that a police officer called and asked him to come to the station "to see if I could pick out the individual who did the shooting" (H. 43). Arriving at the station, Cash met Webb and escorted him to the detective room. While walking with Cash, Webb said that he spotted and identified the petitioner, who was sitting 15-20 feet away, as the gunman.

Willie Johnson, the third eyewitness, had two opportunities to observe petitioner before the lineup ceremony. Johnson arrived at the station around 3:30 or 3:45. He came in response to a message, left at his home, to the effect that the police "had somebody down there that they wanted me to look at in a lineup" (H. 96). Johnson got to the stationhouse and went to a waiting room near the detectives' office. From that vantage point he noticed petitioner in an adjoining room (H. 97). A short time later, Detective Cash and the petitioner walked directly past Johnson as he sat in the waiting room (H. 100). Following that, Cash told Johnson that a lineup would be held and that Johnson would be asked if he could recognize any of the suspects (H. 101).

Mary Phifer was taken to the station in the early evening of July 13. She did not see the petitioner until the lineup procedure was underway.

Appendix G

Two lineups were held on July 13, both of them composed of the same six black men. In both lineups the four witnesses picked Jackson out as the gunman.

4. *The Wade Hearing.*

At the *Wade* hearing, all four witnesses described the gunman in virtually identical terms. (H. 35-36, 52, 65, 80, 115, 127). He was a light-complexioned negro of medium build, about 5'8", wearing tan pants and a gold shirt and sporting a "slight" (or "light") moustache. All four characterized the gunman's haircut as being a "semi-Afro." All four identified Jackson at the *Wade* hearing as being the gunman.

Police reports indicated that Mary Phifer did not report seeing a moustache on the night of the crime, and the description issued by the police, which was based on descriptions given by various people at the bar that night, also made no mention of a moustache. (T. 204). It did, however, conform on the whole to the description given by the four witnesses at the *Wade* hearing.

At the close of the *Wade* hearing, the court ruled that the identification procedure was not impermissibly tainted by suggestive activity on the part of the police, clearing the way for the subsequent in-court identifications. His ruling on this point, made on the record soon after the hearing had ended, reads as follows:

> The people in the lineup was proper the Court holds. It was a proper lineup. The identification for the lineup was proper.
>
> However, there is a further question in the

entire situation. Three of the witnesses; namely, Webb, Johnson and Byrd, all testified that they saw the defendant seated in the police station before he was taken to the lineup.

Query: Would that fact render a situation where there would be a tainted identification before the court?

Webb stated that this defendant was some fifteen or twenty feet away and seated with someone else when he saw them. And no mention was made to him and nothing was stated to him concerning the identification by any police officer. But he did make this identification voluntarily.

And the same held good for Johnson and Byrd.

Of course, the thought arises with the Court whether the police had planned this, whether the police had planned for this defendant to be there at the time.

I think the situation was highly unusual. And the Court during the luncheon recess read through the minutes which you were kind enough to have printed, and there is absolutely no testimony that this was planned — which entered my mind.

Therefore, the Court holds — and I say

> there was a very, very serious question before the Court, and I did a lot of deliberation on it, and I was very concerned about it. But after reading all the testimony and going through it I will hold that the identification was proper and would not so contaminate an in-court identification.
>
> Let's proceed.

(H. 203-204).

Petitioner's attorney then called the court's attention to the fact that Byrd was specifically told beforehand that he would be asked to identify Dixon's murderer. The court answered:

> I appreciate your argument. But he said that at the place. But there is no showup as we know a showup. He just happened to be sitting there. No one said there was anyone else there. There were other people around.

(H. 206).

Petitioner's counsel then suggested that the police had "contrived the scheme" (*Id.*). The court answered:

> The main point in this whole issue is would it so contaminate the testimony; and I think it won't. Even if what you say would be true, I don't think it would.

(*Id.*).

Appendix G

Petitioner's attorney asked the court to consider the "complete divergence" between the police officers' testimony (*Id.*). The court declined to do so:

> Counselor, as I say, it comes down to one question: would the identification of the independent source; namely the place where it happened, be tainted by this testimony? And I think it won't.
>
> Let's proceed with the trial.

(H. 206-207).

The foregoing constitutes the entire findings of the trial judge regarding the issues raised at the *Wade* hearing.

5. *The Identifications at Trial.*

The trial court did have one more opportunity to comment on the *Wade* proceeding. This occurred at trial.

During the redirect examination of eyewitness Mary Phifer, the district attorney questioned her regarding her previous identification. Counsel for petitioner objected on the ground that it would merely tend to bolster Phifer's in-court identification and would therefore be overly prejudicial (T. 89). The trial court allowed Phifer — the only eyewitness who did not see Jackson in the station house before the lineups — to testify as to her previous identification, but excluded testimony by the other three eyewitnesses with respect to the lineup identifications: He ruled as follows (after hearing oral argument from both sides):

> THE COURT: I am going to allow a lineup identification just for this witness and for none of the other witnesses — just for this witness alone — because we had a Wade hearing, and the other witnesses testified they saw this Defendant sitting in the police station before they went in to the lineup. Therefore, I am disallowing the other identifications in the lineup.
>
> However, I held in my original decision that even that did not taint the out of Court —
>
> [ASSISTANT DISTRICT ATTORNEY]: In Court.
>
> THE COURT: — identification for the in-Court identification for the other witnesses. However, I will not let him go into the lineup identification —
>
> [ASSISTANT DISTRICT ATTORNEY]: Just for the record, I had no intention of doing it with the other three witnesses anyway.

(T. 90).

At trial, all four eyewitnesses identified petitioner as the man who shot Harold Dixon (T. 38, 123, 145-46, 173-74).

Appendix G

III.

Identification Procedures

1. *Requirement of Findings and the Presumption of Correctness.*

Preliminarily, the respondent urges that the findings of the state trial judge after the *Wade* hearing are entitled to the presumption of correctness found in 28 U.S.C. § 2254(d). That section reads in pertinent part:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

In *LaValle v. Delle Rose,* 410 U.S. 690, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973) the Supreme Court held that a written opinion which summarized the evidence at a Huntley hearing in such a way as to indicate to the court that the state judge applied the correct standard and considered the proper elements was entitled to presumptive weight.[1] The Second Circuit has interpreted *Delle*

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1. Four justices joined a strong dissent on the ground that the state judge had not adequately explained his conclusions. 410 U.S. at 695-701, 93 S.Ct. 1203 (Marshall, J., dissenting).

Rose as holding that it "is only where 'it can scarcely be doubted' that the relevant factual issues have been resolved against the petitioner and that 'there is no evidence that the state trier utilized the wrong [legal] standard,' that § 2254 requires the habeas court to dismiss a subsequent petition without an independent evidentiary hearing. *LaVallee v. Delle Rose*, 410 U.S. 690, 692 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973)." *United States ex rel. Williams v. LaVallee*, 487 F.2d 1006, 1011, (2d Cir. 1973), *cert. denied*, 416 U.S. 916 94, S.Ct. 1622, 40 L.Ed.2d 118 (1974) (emphasis and brackets in original). The Second Circuit in *Williams* made it plain that "the habeas court must itself insure that the relevant facts were found and that the correct legal standard was applied to them." *Id.* at 1010. Accordingly, the Second Circuit ordered the district court to hold a hearing where the state trial court "did not focus, and did not make specific findings on [important] factual questions. . . ." *Id.* at 1011.

The other cases cited by respondent reflect the proposition that state court findings are entitled to considerable weight. *United States ex rel. Pella v. Reed*, 527 F.2d 380, 384 (2d Cir. 1975); *United States ex rel. John v. Casscles*, 489 F.2d 20, 25 (2d Cir. 1973), *cert. denied*, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974), *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 915 (2d Cir.), *cert. denied*, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970). But it is clear from these cases, as it is from *Delle Rose* and *Williams*, that the district court must satisfy itself that the state judge came to his conclusion by finding the pertinent facts and by applying the proper standard to the facts so found. Clearly, this is the objective sought by the § 2254(d) requirement of written findings.

A finding made on the record at the conclusion of a hearing is, for all practical purposes, the equivalent of a written finding.

However, to be accorded substantial weight, such a finding must be sufficiently clear to be reviewable. Findings must be expressed or clearly inferable to enable a reviewing court to ascertain whether correct legal principles were applied by the state court. *See Townsend v. Sain*, 372 U.S. 293, 313-314, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

In cases involving pre-trial identification, the Supreme Court has set forth precise factors which must be taken into account in determining whether the accused has been deprived of his constitutional right to have proscribed any unreliable in-court identification that results from suggestive police procedures. A review of Justice Dubin's conclusions must await a fuller discussion of these factors and of the case law in the area.

2. *Pre-trial Identification.*

In the Supreme Court's various decisions in the area of pre-trial identification procedures, from *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) to *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) to *Foster v. California*, 394 U.S. 440, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969) to *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) to *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1973) to the most recent pronouncement, *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977), the Court's chief concern has been the problem posed by courtroom identification testimony which was the possible product of a suggestive pre-trial identification procedure. *Manson, supra*, at 111, 97 S.Ct. 2243. The Court's decisions have sought to forge standards which a) will ensure that the testimony given is reliable and not so tainted by suggestive procedures as to make it likely that the witness has replaced the image of the perpetrator

with that of the accused, and b) will serve as a deterrent to police misconduct. *Manson v. Brathwaite, supra,* at 112, S.Ct. 2243.

In deciding whether or not to permit a witness to make an in-court identification, a two-step process must be employed. The court must determine whether the pre-trial identification procedures employed were in fact suggestive. If it determines that those procedures were suggestive, the court must then determine whether the identification to be made at trial was so tainted by the suggestive procedures as to be rendered unreliable, and therefore inadmissible. At this second stage, the court must evaluate the "totality of the circumstances" in light of five distinct factors — "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation," *Neil v. Biggers, supra,* 409 U.S. at 199-200, and determine whether there exists "a very substantial likelihood of misidentification. *Id.* at 198, 93 S.Ct. at 381, *quoting Simmons, supra,* at 384, 88 S.Ct. 967.

A. *Suggestiveness*

Petitioner contends that the circumstances surrounding the pre-trial identification lineups were suggestive. He insists that much of the *Wade* and trial testimony supports the conclusion that the police made sure that the eyewitnesses would make positive identification, initially by "priming" the witnesses in telling them that they were going to be asked to identify the Harvey's Lounge gunman, and thereafter by exposing petitioner to three of the eyewitnesses prior to the lineup. The lineups, he contends, merely strenghtened the erroneous impressions made earlier.

Appendix G

Petitioner notes that Justice Dubin, in his remarks after the *Wade* hearing, characterized the testimony as posing a "very, very serious question" as to whether the police had manipulated the petitioner and the eyewitnesses in such a way as to elicit unwarranted identifications (H. 204). He also points out that Justice Dubin later excluded from the trial all testimony regarding the out-of-court identifications of the three witnesses in question "because we had a *Wade* hearing, and the other witnesses testified they saw this Defendant sitting in the police station before they went into the lineup." (T. 90). Petitioner urges that this ruling compels the conclusions that Justice Dubin held that the stationhouse confrontations were suggestive enough to bar any evidence of them at trial, but not so damaging as to preclude the three eyewitnesses from making in-court identifications at trial.

The fact of the stationhouse identifications left petitioner in a fairly unsatisfactory position at trial. Petitioner could probably have demanded and received the right to examine the witnesses about the suggestive identification but to do so would have revealed to the jury that petitioner had already been identified four times by three of his four accusers before trial (the suggestive confrontation, the two line-ups and the *Wade* hearing). In foregoing this avenue, however, the petitioner was unable to show that the identification testimony, upon which the prosecution case rested, was infected by suggestive pre-trial confrontations.

The procedures used in petitioner's case are similar to others which have been categorized as "suggestive" in various Supreme Court and Second Circuit decisions. In *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), the petitioner was identified by a rape victim at a stationhouse "show-up" that took place seven months after the rape. The police asserted that petitioner's unusual physique necessitated the "show-up" since they had been unable to locate individuals of similar age and build

despite a fairly diligent search. The Court labelled the procedure "suggestive." *Id.* at 199, 93 S.Ct. 375.

The Court frowned on the hospital room "show-up" used in *Stovall v . Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967), but found it acceptable only because the eyewitness was in danger of dying before a lineup could be arranged.

The Second Circuit has characterized the "show-up" as impermissibly suggestive. Thus in *United States ex rel. Lucas v. Regan,* 503 F.2d 1 (2d Cir. 1974), the court implicitly found the "show-up" there employed to be impermissibly suggestive but applying the *Biggers* factors, allowed the conviction based on the witness's in-court identification to stand. *Id.* at 4. The same analysis was used under somewhat analogous circumstances in *United States ex rel. Carnegie v. MacDougall,* 422 F.2d 353, 354 (2d Cir. 1970) (per curiam) (show-up), and in *United States ex rel. Rutherford v. Deegan,* 406 F.2d 217 (2d Cir. 1969) (petitioner, black, spontaneously identified while sitting among white detectives).

In this case, the evidence indicates that the police arranged to have the various eyewitnesses on hand at the stationhouse when petitioner was brought in, that three of the witnesses were afforded a pre-lineup opportunity to see, and in fact did see, the petitioner either alone or in the company of detectives whom they knew to be working on the Harvey's Lounge case, and that the police were, at the very least, grossly negligent in allowing the show-ups to take place. This evidence leads me to find that the procedures, to put it most charitably, were "impermissibly suggestive."

This finding leads to inquiry as to whether, under the totality of the circumstances, the courtroom identifications were reliable.

Appendix G

B. *Reliability*

As noted previously, the search for reliability entails weighing the evidence in the light of the five *Biggers* factors. In this case, it would be appropriate to note whatever findings Justice Dubin made in regard to each of these factors.

(1) *The opportunity of the witness to view the criminal at the time of the crime.* Although the testimony on this point was both extensive and crucial, Justice Dubin made no finding.

I note first the time and the locale of the crime: 1:30 a.m. in a crowded bar — a drinking establishment.[2]

The testimony describes pandemonium at the crime scene as the customers scrambled for safety during the short interval when the gunman was present in the bar. The lateness of the hour, the crowded conditions and the confusion that reigned suggest what the witnesses had little opportunity and less motivation to examine the perpetrator's features.

Respondent asserts that the eyewitnesses had sufficient time and opportunity to observe petitioner and cites a number of Second Circuit cases in support of this view. He relies chiefly on *United States ex rel. Phipps v. Follette*, 428 F.2d 912 (2d Cir.), *cert. denied*, 400 U.S. 908, 91 S.Ct. 151, 27 L.Ed.2d 146 (1970), where

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2. The eyewitnesses testified to periods they had been in the bar at the time of the shooting, and with respect to their consumption. Byrd stated he had been in the bar 15 minutes and drank only 7-up (T.118); Johnson said he had been there 45 minutes and was served one drink, which he did not drink (T. 141); Phifer said she had been in the bar for an hour and had one drink (T.34-35); and Webb, who was one of the bartenders, said he had nothing to drink (T.170-171).

the eyewitness, who had twenty to thirty seconds to observe the robber in early morning daylight, made positive identification of the petitioner one hour after the incident took place. Since no findings were made in the case at bar relative to the amount of time the witnesses had to view the gunman at the scene, there is no way of telling whether the witnesses had one or sixty seconds to view the assailant; the evidence could conceivably support either figure. It is clear, however, that the eyewitness in *Phipps* was directly involved with the criminal and was not scrambling for cover. The *Phipps* witness was a true victim within the meaning of *Biggers* and *United States v. Mims*, 481 F.2d 636 (2d Cir. 1973) and thus, as those courts have noted, was more likely to retain the image of the assailant's face. Although, as respondent asserts, the witnesses in this case were *potential* victims, they were not victims within the meaning of *Phipps* and *Biggers:* they were not singled out by the perpetrator as the objects of his criminal design. They were bystanders positioned in or near the line of fire with no interest in memorizing the gunman's features and every interest in fleeing the vicinity.

The other cases cited by respondent are distinguishable on other grounds. Thus *United States v. Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974) involved a photographic display that followed a brief viewing of the perpetrator's profile. The Second Circuit, reviewing the findings of the district court, merely noted that "there is no evidence in the record indicating that [the witness'] view of [the criminal] was inadequate for [the witness] to formulate a clear visual and mental impression of [the criminal]." *Id.* at 1330. Here, aside from the fact that there is no finding to review, the record discloses a good deal of evidence to the effect that the conditions for observation were less than ideal.

Similarly inapposite is *United States ex rel. Cummings v. Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927, 92 S.Ct.

1800, 32 L.Ed.2d 128 (1972) where the witness was afforded an unobstructed and unhurried opportunity to observe the petitioner for fifteen seconds while the petitioner stood in the backyard bathed in broad daylight.

(2) *The witnesses' degree of attention.* Again, Justice Dubin offered no finding on this issue.

Much of the prior discussion has underscored that the atmosphere in Harvey's Lounge at the moment of the crime left little room for detached and reflective observation. Furthermore, as has also been pointed out, the witnesses were not victims within the meaning of *Biggers* and *Follette.* The witnesses were motivated, not to observe and remember the gunman's features, but rather to escape the line of fire as quickly as possible.

(3) *The accuracy of the witnesses' prior descriptions.*

Again, Justice Dubin made no findings of fact on this issue, possibly because the evidence was scant. Although the police issued a description of the killer drawn from the accounts given by various people at the bar (T. 219, H. 172), the record does not indicate the specific descriptions, if any, given by the three witnesses in question.

While all of the eyewitnesses testified at the *Wade* hearing that they remembered the killer as wearing a moustache, the general description issued by the police immediately after the crime, presumably reflecting the descriptions then furnished by the eyewitnesses, made no reference to a moustache.

(4) *The level of certainty demonstrated by the witnesses at the confrontation.*

Appendix G

Justice Dubin found that Joseph Webb was sitting some fifteen to twenty feet from petitioner when he noticed him, that he was not told that the police suspected petitioner, and that his identification was made voluntarily (H. 203). Although the circumstances of the confrontations involving Byrd and Johnson were different (Johnson, for example, saw petitioner twice before the lineup and did not report any identification of petitioner to the detectives on either occasion), Justice Dubin merely stated that "the same held good for Johnson and Byrd." (H. 203).

Although Webb testified to a high degree of certainty (H. 78-80) Johnson made no independent identification after either of the two show-ups at the stationhouse when he saw petitioner. Byrd's identification appears to have been communicated fairly quickly (H. 116), and therefore a substantial degree of certainty can be inferred.

(5) *The length of time between the crime and the confrontation.*

Justice Dubin made no mention of the one month delay between the incident and the show-ups nor of the consequent possibility that the witnesses' memories had faded to the point where the original image of the criminal had grown indistinct, to be replaced by the suggestively proffered image of the petitioner.

3. *The Due Process Implications of the Pre-Trial Identification*

Justice Dubin having failed to make any findings in most of those crucial areas, I proceed to make my own findings on the record before me. In so doing I note that, except for the identifications, not a scintilla of evidence was offered at the trial to connect petitioner with the crime. Had there been independent

corroborating evidence of petitioner' guilt apart from the various identifications (*see United States ex rel. Phipps v. Follette*, 428 F.2d 912, 916 (2d Cir. 1970)), or had the show-ups been less likely to produce unreliable identifications, I might have been more willing to defer to the state court. On the facts of this case, however, the reliability of the eyewitnesses' testimony could hardly be more crucial.

After a careful examination of the *Wade* hearing and trial transcripts, I find (1) that the witnesses did not have a good opportunity to view the gunman at the time of the crime; (2) that the witnesses had little motivation to study the gunman's face and every reason to turn and run; (3) that no evidence now before the court gives any definite indication of how the three witnesses in question initially described the gunman (and that therefore, no firm basis for comparison exists); (4) that the witnesses appeared to have displayed varying degrees of certainty at the stationhouse and (5) a considerable amount of time (one month) had elapsed between the time of the crime and the time of the confrontation.

I conclude that the stationhouse procedures were suggestive, and that the identification testimony of three of the four eyewitnesses was irreparably tainted thereby. The procedures were so suggestive, in fact, that they gave rise "to a very substantial likelihood of irreparable misidentification" (*United States v. Simmons*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)) to the degree that permitting these witnesses to make in-court identifications constituted a denial of due process. *See United States ex rel. Phipps v. Follette*, 428 F.2d 912, 914-15 (2d Cir. 1970). Petitioner's conviction on the basis of that testimony cannot stand.[3]

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3. I shall not speculate that a jury might have convicted upon the testimony of Mary Phifer alone: three of the four identification witnesses which the State tendered

(cont'd)

Appendix G

IV.

The Non-reciprocal Alibi Statute

Petitioner claims that due process was violated by the application of New York Code of Criminal Procedure §295-L which required petitioner to disclose to the prosecution his intended alibi witnesses but imposed no reciprocal duty on the prosecution to give notice of any intended rebuttal witnesses.

1) *The Alibi, and the Rebuttal Evidence.*

Petitioner called three alibi witnesses at his trial, all of whom testified that petitioner was at his home on the night of June 14.

George Carter testified that he was a friend of petitioner that he worked for the Americal Oil Company and that he had stopped by petitioner's home on the evening of June 13, 1970. Carter said that he had dropped by earlier that day to speak with Jackson while on the way to make a delivery for his employer (T. 235). Carter testified that he returned to petitioner's house at about 11:30 p.m. after making another delivery. Carter found Jackson in the kitchen with his head on the table. Efforts to rouse petitioner proved fruitless and Carter, after chatting with a Herlene Washington who was also in the kitchen, went upstairs (T. 236). There, Carter chatted with Robert Moses, a tenant in the house, who ascribed Jackson's condition to wine (T. 239). After drinking a glass of wine, Carter left the house to return the company's truck, returning to the house around 12:30 a.m. (T. 239).

(cont'd)
should not have been permitted to testify, and obviously the State regarded their testimony as important, or it would not have used them.

Appendix G

Carter testified that after Herlene Washington let him back in, he saw petitioner, and then spent the rest of the evening with Moses in his room since petitioner was still *non compos mentis.* Carter finally left about 4:30 a.m. after seeing petitioner for one last time (T. 240, 243-4).

Robert Moses, the tenant, testified that he first saw Jackson at about 10 p.m. the evening of June 13 in the kitchen. At 11:30 p.m., he returned to the kitchen to find Carter, Washington and petitioner all present (T. 247-48). Moses testified that he came back to the kitchen about 1 a.m. and noticed Washington and the petitioner there. Petitioner was "still stretched out across the table." (T. 249).

Herlene Washington testified that she was baking a cake in the kitchen during the period in question — 11:30 p.m. to 2:30 a.m. She testified that Jackson was "laying with his head down on the table" for the entire period (T. 262). Her testimony corroborated the various events testified to by Moses and Carter.

At the close of the petitioner's case, the People called one Joseph Gorr as a rebuttal witness. Gorr, who was George Carter's supervisor at the American Oil Company, gave testimony based on employee time records and punch cards which tended to contradict Carter's testimony regarding his whereabouts on the night in question. The documents were admitted into evidence, after several off-the-record conferences, over defense objection (T. 278).

The records indicated that Carter left the terminal in the Inwood section of Nassau County at 1 p.m. (T. 279), made two deliveries and checked into Amoco's Grand Street terminal at 5:30 p.m. (T. 292). He left, made two more deliveries, and returned to Grand Street at 9:30 p.m. (T. 280-8). He then drove out to Astoria

Boulevard in Queens, made one delivery, and returned to Grand Street three hours later at 12:30 a.m. (T. 298). He made one more stop that night, delivering 2800 gallons of gasoline to a Brooklyn address (T. 298-300). Finally he returned the truck to Inwood and signed out at 3:17 a.m. (T. 282).

Gorr agreed that the records were entirely of the individual driver's own making, and that the supervisor had no way of knowing whether the records accurately reflected the driver's movements and no way of knowing whether the driver made any stops beyond those listed on the records (T. 287, 293-95).

Petitioner's attorney did not indicate for the record whether he was surprised by the rebuttal witness or not. The two side-bar conferences that were held at the time that Mr. Gorr began his testimony were not recorded, nor did petitioner's attorney make known the basis of his objection to the time records. Petitioner's attorney did request a five-minute recess during Gorr's cross-examination (T. 288) and another one following redirect examination (T. 301-302), both of which were granted.

2) *Retroactivity of Wardius v. Oregon.*

N.Y. C.C.P. § 295-1 (and its predecessor, N.Y.C.P.L. §250.20) is unconstitutional in light of *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) (declaring a similar Oregon statute unconstitutional) and *People v. Bush*, 33 N.Y.2d 921, 352 N.Y.S.2d 936, 308 N.E.2d 451 (1973), *cert. denied*, 419 U.S. 848, 95 S.Ct. 85, 42 L.Ed.2d 77 (1974), (declaring the New York version unconstitutional). The significant question is whether *Wardius* is retrospectively applicable to trials, such as petitioner's, which took place prior to June 11, 1973, the date of

the *Wardius* decision.[4]

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4. Petitioner preliminarily suggests that the significant date is not the date of the Wardius decision, but rather June 22, 1970, the date of the decision in *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446. In *Williams*, the court considered the constitutionality of a Florida statute which imposed a duty on the defendant to disclose intended alibi witnesses and a reciprocal duty on the prosecution to disclose alibi rebuttal witnesses. The statute was challenged on the ground that it violated the Fifth and Foureenth Amendment prohibitions against compelling criminal defendants to be witnesses against themselves. The Court upheld the statute, noting, in the course of its opinion, that the Florida statute was "carefully hedged with reciprocal duties requiring state disclosure to the defendant." *Id.* at 81, 90 S.Ct. at 1896.

Petitioner urges that the Wardius doctrine was in full bloom as of the date of *Williams;* that *Wardius* was a mere restatement of *Williams;* and that the question of retroactivity should therefore be reckoned from the date of *Williams*, which was decided prior to petitioner's trial. Petitioner relies on a footnote to the *Williams* decision which he characterizes as a "specific warning to New York and other states with notice of alibi statutes." It reads as follows:

> We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the State.

Id. at 82 n.11, 90 S.Ct. at 1896 (emphasis added). While the language in that footnote may be instructive on the question of whether the prosecution was entitled to rely on prior statutory standards in failing to supply defendant with notice of witnesses intended to rebut alibi testimony, *Michigan v. Payne*, 412 U.S. 47, 51, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1972), the Court stopped short of announcing a new precedent. Indeed, considering the facts and issue presented to the Williams court, the language on the question of "reciprocal discovery" was dictum. While *Williams* may well have heralded *Wardius'* constitutional rule with respect to advance notice of alibi rebuttal witnesses, it did not constitute a binding constitutional interpretation.

Appendix G

In *Wardius*, the defendant had presented an alibi witness who testified that she and the defendant were at the movies when the alleged crime occurred. Her testimony was stricken by the court, and defendant was thereafter precluded from testifying to the alibi, because defendant had failed to comply with an Oregon statute requiring defendants to give advance notice of intended alibi witnesses. The Supreme Court reversed the defendant's conviction. It declared that the statute was "fundamentally unfair," since it required "a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 476, 93 S.Ct. at 2213.

The Court rejected Oregon's argument that defendant should have allowed the state courts to rule on the statute by giving notice of his alibi witness and then requesting reciprocal discovery of rebuttal witnesses. Holding that the defendant could not "be faulted for taking the [Oregon] legislature at its word," *id.* at 478, 93 S.Ct. at 2214, the Court stated that defendant could not be required to disclose his alibi witnesses on the hope that the state court, in derogation of the statute, would grant him reciprocal disclosure of prosecution rebuttal witnesses. *Id.* at 477-78, 93 S.Ct. 2208. The state "cannot constitutionally force compliance with its scheme on the basis of a totally unsubstantiated possibility that the statute might be read in a manner contrary to its plain language." *Id.* at 479, 93 S.Ct. at 2214.

The Court has given no indication whether its ruling should be applied retroactively.

In deciding this question, it will be helpful to review some of the lower court cases in which the issue of retroactivity with respect to *Wardius* has already been confronted.

Appendix G

In *Mayer v. Moykens* 373 F.Supp. 649 (D. Vt. 1973), (Waterman, C.J., sitting by designation), *aff'd* 494 F.2d 855 (2d Cir. 1974), *cert. denied*, 417 U.S. 926, 94 S.Ct. 2633, 41 L.Ed.2d 229 (1975), petitioner, convicted after a trial held prior to *Wardius*, claimed that a Vermont statute was unconstitutional in light of *Wardius*. The statute obligated a defendant who contemplated making use of an alibi defense to give the prosecution written notice stating where he claimed to have been at the time the crime took place. Noting that the statute did not require the defendant to provide a list of alibi witnesses, Judge Waterman found that the petitioner was unable "to show material prejudice to him" resulting from the application of the statute. He held that, whether or not the Vermont alibi statute was constitutionally valid after *Wardius*, *Wardius* should not be applied retroactively to those facts. The Second Circuit affirmed, noting that petitioner's counsel had conceded the *Wardius* argument to be meritless. 494 F.2d at 859.

An Illinois notice of alibi statute was challenged in *United States ex rel. Hairston v. Warden*, 407 F.Supp. 524 (N.D. Ill.), *rev'd*, 539 F.2d 713 (7th Cir. 1976). In *Hairston*, the attorney for petitioner provided the habeas court with an affidavit explaining that, prior to the state trial which resulted in petitioner's conviction, he had weighed the possibility of presenting an alibi defense and had made a pre-trial motion seeking an order declaring Illinois non-reciprocal notice-of-alibi statute unconstitutional or alternatively directing the prosecution to turn over a list of rebuttal witnesses, grand jury minutes, police reports and statements of witnesses. The motion, decided before *Wardius*, was denied and petitioner's attorney elected to forego the alibi defense rather than to risk the uncertainties built into the non-reciprocal statute. The petitioner was convicted. The habeas court found that the statute "placed a constitutionally impermissible obstacle in the path of the fact-finding process at trial," *id.* at 528. It applied *Wardius*

retroactively, asserting that the thrust of *Wardius* was to eliminate "an aspect of the criminal trial that substantially impairs its truth finding function and so raises questions about the accuracy of guilty verdicts in past trials." *Id.* at 529, quoting *Williams v. United States,* 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971).

The Seventh Circuit reversed in an unpublished opinion. It characterized *Wardius* as being concerned primarily with the exclusion of relevant evidence by means of a procedure which "unfairly weighted the trial process in favor of the prosecution." (slip. op. at 2). In the Seventh Circuit's view, the aggrieved party must show that the evidence was improperly excluded by the court and that the exclusion tainted the fact-finding process. *Id.* Since the petitioner in *Hairston* did not move for a pre-trial ruling allowing him to present his alibi at trial without first complying with the statute, the court concluded that he was not prejudiced by the application of the statute. The court apparently concluded that petitioner's pre-trial request for a list of rebuttal witnesses, which was denied, did not implicate the statute.

New York's statute has been the subject of considerable litigation, much of it concerning one Leon Bush. Bush, at his 1971 murder trial, had given notice of his intended alibi witnesses after losing a motion to have C.C.P. § 295-L declared unconstitutional. He then moved for an order directing the prosecution to reveal the identities of its rebuttal witnesses. The motion was denied, Bush put in his alibi defense and the state called three surprise rebuttal witnesses. Bush was convicted. On appeal, the New York Court of Appeals held the statute unconstitutional, *Wardius* having been decided during the pendency of the appeal, but denied Bush relief by declining to apply *Wardius* retroactively. *People v. Bush,* 33 N.Y.2d 921, 352 N.Y.S.2d 936, 308 N.E.2d 451 (1973), *cert. denied,* 419 U.S. 848, 95 S.Ct. 85, 42 L.Ed.2d 77 (1974). In

reasoning somewhat similar to that of the *Hairston* court, the Court of Appeals noted that in *Bush*, unlike *Wardius*, the defective statute did not work an exclusion of testimony, but "operated only to deny defendant of advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony." *Id.* at 923, 352 N.Y.S.2d at 937, 308 N.E.2d at 451. Only where the application of the statute resulted in exclusion of evidence would the court apply *Wardius* retroactively, as it did in *People v. Morales*, 37 N.Y.2d 262, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975).

Bush next petitioned for a federal writ of habeas corpus. In *Bush v. Fogg*, No. 76 C. 1676 (E.D.N.Y. May 23, 1977), *remanded*, No. 77-2137 (2d Cir. March 2, 1978), Bush contended that *Wardius* should be applied retroactively to cover cases such as his where the notice provision made proper preparation impossible. In denying the writ, the habeas court pointed out that at trial, defense counsel had not moved for a recess or a continuance to prepare a cross-examination and that Bush made no "allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identity of these witnesses prior to their testimony." (slip op. at 20).

In remanding for further consideration of the *Wardius* point, the Second Circuit, in its order, held that petitioner ought be allowed to allege prejudice:

> The district court in its discretion may allow evidence to supplement the record of the State court proceedings and should consider and rule upon whether (1) there was actual prejudice to [Bush], as claimed and (2) if so, whether such prejudice is constitutionally significant.

Slip op. at 2. The case is now pending before the district court.

The Second Circuit's apparent position — that petitioners must at least demonstrate constitutionally significant prejudice in order to have *Wardius* apply retroactively — was foreshadowed in this district in *United States ex rel. McCrory v. LaVallee*, 75 Civ. 6104 (S.D.N.Y. 1977) and in *Green v. Fogg*, 422 F.Supp. 1034 (S.D.N.Y. 1976). In both cases the petitioner had failed to request an adjournment after the introduction of the rebuttal testimony. In *Green*, the court found that since the rebuttal evidence consisted solely of expert testimony contradicting the alibi witnesses' recollection of what the weather was like at the time in question, "the error if there was any at all, was not prejudice."

The gist of these cases, and of the Second Circuit's remand in *Bush*, is that petitioners seeking retroactive application of *Wardius* must allege and prove that the application of the defective statute prejudiced the defendant's case to a constitutionally significant degree. *McCrory and Green* suggest the caveat that the petitioners must have taken appropriate steps to alleviate any prejudice by requesting some measure of relief from the trial court, usually an adjournment or continuance.

It would appear that the Supreme Court case law on the issue of retroactivity does not preclude retroactive application of the *Wardius* rule. It has been clear since *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), that in certain instances new judge-made rules in the criminal procedure area should be applied prospectively only. The *Linkletter* Court, in deciding that *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) should not be applied retroactively, reasoned that it made no sense to give retroactive force to a new rule whose sole purpose was to improve police conduct. Where, in Mr. Justice Clark's words, "the

fairness of the trial is not under attack," *id.* 381 U.S. at 639, 85 S.Ct. at 1743, the Court saw no point in disrupting the administration of justice in the state courts by requiring hearings to pass on evidence "long since destroyed, misplaced or deteriorated," *id.* at 637, 85 S.Ct. at 1742, and to take the testimony of witnesses whose memories on ancient matters would not be reliable. *Id.*[5] These concerns have been reiterated in the more recent retroactivity cases. Thus, in *Michigan v. Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), the Court held:

> The test utilized repeatedly by this Court to ascertain whether "new" constitutional protections in the area of criminal procedure are to be applied retroactively calls for consideration of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards".

Id. at 51, 93 S.Ct. at 1669, *quoting Stovall v. Denno*, 388 U.S. 293, 297, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). I shall consider these factors Seriatim.

(a) *The purpose of the new standard.*

It is plain from the language of the *Wardius* opinion that the Court was primarily concerned with the one-sidedness of the

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5. *See Broderick*, The Supreme Court and the Police: A Police Viewpoint, 57 J.Crim.L., Criminology & Pol.Sci. 271, 272-73 (1966).

discovery procedure. The Court praised the State's efforts to expand discovery so as to help attorneys prepare their cases "and thereby reduce the possibility of surprise at trial." *Wardius, supra,* 412 U.S. at 473, 93 S.Ct. at 2211. The defect in the statute according to the Court, was that unlike the Florida statute construed in *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (see footnote 4 hereto), the Oregon statute demanded that defendants make full disclosure of their witnesses "while maintaining 'poker game' secrecy for [prosecution] witnesses." *Id.* 412 U.S. at 475, 93 S.Ct. at 2212. The focus of the Court's concern was not so much the wrongful exclusion of evidence that resulted as the "fundamentally unfair" situation that the defendant found himself in before the trial even began. *Id.* at 476, 93 S.Ct. 2208. I conclude, therefore, that the purpose of the *Wardius* rule was to eliminate the lack of preparation and consequent surprise that resulted from one-way discovery. This is the gravamen of petitioner's claim.

(b) *The extent for reliance on the old standard.*

Significantly, respondent does not argue that New York law enforcement officials did in fact rely on the pre-*Wardius* standard, but rather argues that the reliance (if any) was justifiable. I find that the matter has been settled by the New York Court of Appeals, and that there has been no extensive reliance by New York law enforcement authorities upon the pre-*Wardius* standard. In *People v. Morales,* 37 N.Y.2d 262, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975), Judge Fuchsberg, for a unanimous court, stated that "there appears to have been no significant degree of reliance on our notice-of-alibi statute by law enforcement authorities in general, or prosecutorial authorities in particular, so as to adversely affect the administration of justice through retroactive application of the *Wardius* rule." *Id.* at 270, 372 N.Y.S.2d at 32, 333 N.E.2d at 344.

Appendix G

(c) *The possible effect on the administration of justice.*

The *Morales* court, in considering this very question, noted that neither party, in that case, had "directed our attention to even a single other reported or pending case involving excluded alibi testimony under the old statute." *Id.* To this date, the only cases similar to petitioner's in New York that the parties at bar have cited to me to are *Bush*, *McCrory*, and *Green*. Indeed, although *Wardius* has been in effect for five years, the litigation on this issue has been sparse. In my judgment the "substantial interference with the administration of justice" predicted by respondent will not come to pass.

My findings (1) that there was little reliance, and (2) that the administration of justice will not be disrupted by retroactive application, make unnecessary a determination whether the *Wardius* rule was designed to overcome a substantial impairment of the truth finding function of criminal trial so as to override all claims of reliance and disruption. *See Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 2343, 53 L.Ed.2d 306 (1977) (No. 75-6568); *Ivan v. City of New York*, 407 U.S. 203, 204-05, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972), *Williams v. United States* 401 U.S. 646, 653, 91 S.Ct. 1148, 28 L.Ed.2d 388 (1971).

There being no bar to retroactive application, the question remains whether petitioner has shown the necessary degree of prejudice.

The parties differ as to the existence and degree of prejudice. Respondent insisted that Gorr's rebuttal testimony could not have surprised the defense since Mr. Kellam should have anticipated a rebuttal based on the work records. It also points out that the record shows that Mr. Kellam did not request anything more than brief

recesses, that the court granted these requests, and that no objection was made on the record to Gorr's testifying. Respondent further argues that the rebuttal testimony was restricted to the credibility of the alibi witnesses and therefore did not "substantially impair [the] truth-finding function" of petitioner's trial, within the meaning of *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388 (1971).

Petitioner, on the other hand, takes the position that Mr. Kellam was caught completely by surprise as a result of the statute. He argues, in effect, that the production of Gorr and the introduction of the time cards without advance warning threw the defense into disarray, destroyed the credibility of the alibi witnesses and created a false impression in the minds of the jurors that the petitioner had attempted unsuccessfully to orchestrate a fabrication. He further argues that, aside from the damage caused at trial, his case was prejudiced by the statute at the outset in that it compelled him to choose between putting in an alibi defense (with the concomitant risk of destructive surprise) and foregoing the alibi evidence entirely, and points out that this is the form of prejudice with which *Wardius* was primarily concerned.

I am satisfied that procedural considerations aside,[6] petitioner

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6. Petitioner prior to trial moved for a bill of particulars and requested that a list of all prosecution witnesses be included. The trial court denied the request. Respondent insists that a motion for a bill of particulars is an inappropriate method of requesting lists of witnesses. The record indicates that at trial, the defense counsel, Mr. Leroy Kellam, made an objection to the introduction of the time cards (which respondent's rebuttal witness identified) after two off-the-record side bar conferences. No formal objection was ever made on the record to Gorr's testimony. At the close of the direct examination, Mr. Kellam began cross-examining the rebuttal witness without requesting an adjournment or a continuance. After a while, Mr.

(cont'd)

sustained material substantive prejudice of constitutional dimensions from the requirements of the alibi statute. The state's surprise rebuttal evidence effectively destroyed the credibility not only of the truck driver Carter, at which it was directed, but also of the other alibi witnesses, Washington and Moses. If defense counsel had known that the rebuttal evidence would be offered, he could have dealt with it in his examination of Carter, or he could have proceeded with two instead of three alibi witnesses, eliminating Carter.

I find that *Wardius* applies to the trial of petitioner. On this ground also, therefore, the writ is granted.

V.

The Requested Lineup

I think it worthwhile to set forth my findings on petitioner's other claim so as to avoid an otherwise unnecessary remand in the event of an appeal and reversal on this issue.

Prior to petitioner's arrest, the police had listed only John Walker and Veryl Walker as suspects. After petitioner's indictment and prior to trial, petitioner's attorney suggested investigation of another possible suspect. Acting on a tip to the effect that one Anthony Carolina was the Harvey's Lounge gunman, Leroy

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(cont'd)

Kellam requested and received a short recess (T. 287-88) and then continued his questioning. After the cross-examination and a brief recess. The court replied, "We are going to sit right here and do what you want" (T. 301). Mr. Kellam then left the court room for a brief period while the judge, prosecutor, defendant, and jury sat waiting (T. 302). Mr. Kellam had no further questions upon his return.

Kellam, petitioner's attorney, visited Carolina on February 2, 1971 at the Queens House of Detention. (In an affidavit submitted to this court, Kellam stated that Carolina resembles petitioner.) Kellam then filed a motion asking that a new line-up be held involving Carolina and that the entire matter be resubmitted to the grand jury. Justice Frank D. O'Connor of the Queens Supreme Court denied the motion without hearing opposition argument.

Mr. Kellam also wrote to the Queens District Attorney requesting an investigation of Carolina and a new line-up. The district attorney denied this request.

Petitioner argues that the State trial court's refusal to order the lineup requested by petitioner amounted to a denial of due process under the Fourteenth Amendment. Petitioner reasons that the prosecution occupies a much stronger position than the accused, *Application of Kapatos*, 208 F.Supp. 883, 888 (S.D.N.Y. 1962), that the prosecution is under a duty to disclose relevant evidence under many circumstances, *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and that the prosecution has, upon occasion, been ordered to cooperate with the accused in obtaining important potential witnesses, *United States v. D'Angiolillo*, 340 F.2d 453 (2d Cir. 1965). Petitioner also relies on *Evans v. Superior Court*, 11 Cal.3d 617, 114 Cal.Rptr. 121, 522 P.2d 681 (1974) and *State v. Boettcher*, 338 So.2d 1356 (La. 1976) which held that in certain instances, a criminal defendant has the right under the Due Process Clause to request and receive a pre-trial lineup. The circumstances of this case, it is urged, indicate that a lineup should have taken place.

I agree with respondent that this case is controlled by the Second Circuit's determination in *United States v. Ravich*, 421 F.2d 1196, 2d Cir. *cert. denied*, 400 U.S. 834, 91 S.Ct. 69, 27

L.Ed.2d 66 (1970), which, it should be pointed out, was a federal prosecution for bank robbery. In *Ravich*, the defendant's picture was picked out by several witnesses from a photographic array. The defendant then requested that he be subjected to a lineup before the same witnesses, a request which the trial court denied. In holding that "[a] pretrial request by a defendant for a lineup is . . . addressed to the sound discretion of the district court and should be carefully considered," *Id.* at 1203, the Second Circuit made it plain that the denial of the lineup request had no constitutional implications.

> While appellants speak in terms of denial of a constitutional right, they have not elaborated on what the right is. Clearly, there is no violation of the confrontation clause of the Sixth Amendment; defendants not merely were given full opportunity to cross-examine the witnesses at trial but had the benefit of pre-trial proceedings in doing so . . . . We would likewise not be disposed to hold a line-up to be so essential to the presentation of a proper defense concerning identification that refusal to arrange one on a defendant's request is a denial of due process of law.

Id. Ravich was cited with approval in *United States v. Estremera*, 531 F.2d 1103 (2d Cir.), *cert. denied*, 425 U.S. 979, 96 S.Ct. 2184, 48 L.Ed.2d 804 (1976), where the court flatly held that "[i]t is now established that a defendant has no constitutional right to a line-up." *Id.* at 1111. *See also United States v. Boston*, 508 F.2d 1171 (2d Cir. 1974), *cert. denied*, 421 U.S. 1101, 95 S.Ct. 2401, 44 L.Ed.2d 669 (1975).

Appendix G

The fact that this case involves a request that a person other than the accused be subjected to a lineup has no little significance. A request made by an individual, accused of a crime but presumed innocent, to subject *himself* to a lineup should perhaps not be cavalierly denied. Where, however, as here, the request is that *another individual* be compelled to stand in a lineup, a far more delicate situation is presented, since the court must take into account the rights of the unrepresented individual sought to be exposed to the lineup. Although a lineup involving Anthony Carolina might well have been a proper and productive tool in the quest for truth, I find no due process violation in the denial.

VI.

If the indictment is not moved for retrial within 60 days of the date of this memorandum order, petitioner shall be released from all further custody with respect to the charges contained in the indictment.

SO ORDERED.

APPENDIX H — OPINION OF THE COURT OF APPEALS OF NEW YORK DATED DECEMBER 18, 1974

The PEOPLE of the State of New York,

Respondent,

v.

Edmond JACKSON, Appellant.

Court of Appeals of New York.
Dec. 18, 1974

*858 Order, 40 A.D.2d 1081, 337 N.Y.S.2d 1005, affirmed.

No opinion.

All concur.

APPENDIX I — OPINION OF THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT DATED DECEMBER 4, 1972

The PEOPLE, etc., Respondent,

v.

Edmond JACKSON, Appellant.

Supreme Court, Appellate Division, Second Department.

Dec. 4, 1972.

Judgment of the Supreme Court, Queens County, rendered June 2, 1972, affirmed. No opinion.

SHAPIRO, Acting P.J., and GULOTTA, CHRIST, BRENNAN and BENJAMIN, JJ., concur.

N.Y.A.D. 2 Dept. 1972.
PEOPLE v. JACKSON